No. 81-2296

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IN THE

Supreme Court of the United States

October Term, 1981

NATIONAL FOOTBALL LEAGUE; SAN FRANCISCO 49ers; OAKLAND RAIDERS; NEW ENGLAND PATRIOTS FOOTBALL CLUB, INC.; MINNESOTA VIKINGS FOOTBALL CLUB, INC.; THE FIVE SMITHS, INC.; BALTIMORE FOOTBALL, INC.; HIGHWOOD SERVICE, INC.; CHICAGO BEARS FOOTBALL CLUB, INC.; CINCINNATI BENGALS, INC.; CLEVELAND BROWNS, INC.; DALLAS COWBOYS FOOTBALL CLUB, INC.; EMPIRE SPORTS, INC.; THE DETROIT LIONS, INC.; GREEN BAY PACKERS, INC.; HOUSTON OILERS, INC.; LOS ANGELES RAMS FOOTBALL CO.; NEW ORLEANS SAINTS; NEW YORK FOOTBALL GIANTS, INC.; NEW YORK JETS FOOTBALL CLUB, INC.; LEONARD H. TOSE, d/b/a PHILADELPHIA EAGLES FOOTBALL CLUB; PITTSBURGH STEELERS SPORTS; CHARGERS FOOTBALL COMPANY; CHICAGO CARDINALS FOOTBALL CLUB; PRO-FOOTBALL, INC.; and TAMPA BAY BUCCANEERS, INC.,

Petitioners,

against

NORTH AMERICAN SOCCER LEAGUE; ORANGE COUNTY PRO SOCCER; CHICAGO WORLD SOCCER INC.; CARIBOUS OF COLORADO, INC.; MICHIGAN SOCCER, LIMITED; HOUSTON PROFESSIONAL SOCCER CLUB, LTD.; AZTEC PROFESSIONAL SOCCER CLUB; MEMPHIS SOCCER CLUB, INC.; MINNESOTA SOCCER, INC.; LIPTON PROFESSIONAL SOCCER, INC.; COSMOS SOCCER CLUB, INC.; OAKLAND STOMPERS, LTD.; PHILADELPHIA SOCCER ASSOCIATES; OREGON SOCCER, INC.; BLUE & GOLD, LTD.; SAN DIEGO PROFESSIONAL SOCCER CLUB; SAN JOSE EARTHQUAKES, LIMITED; TAMPA BAY SOCCER CLUB, INC.; PRO SOCCER, LTD.; TULSA ROUGHNECKS, LTD.; VANCOUVER PROFESSIONAL SOCCER CLUB, LTD.; and WASHINGTON DIPLOMATS SOCCER CLUB, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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Questions Presented

1. Is there any basis for this Court to grant *certiorari* here, where the Court of Appeals applied classic antitrust principles to declare unlawful an agreement amongst the individual owners of 25 professional sports teams, entered into with a concededly anticompetitive purpose and effect, to "... prohibit [themselves] from making or retaining any capital investment in any member of another league of professional sports teams (in this case the NASL) . . ." (P. App. A 2a, 670 F.2d at 1250)?[1]

2. Should this Court grant *certiorari* to entertain petitioners' request that this Court upset at least twenty-five years of precedent and now legislate, in the words of the Court of Appeals, a "loophole" (P. App. A 18a, 670 F.2d at 1257) from Section 1 of the Sherman Act which would permit professional sports team owners, as distinguished from all other joint venturers, to escape antitrust responsibility for any group restraints entered into by them?

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1. References to the Second Circuit's opinion, contained in Appendix A of the petition, are denoted by "P. App. A——"; references to the District Court opinion, contained in Appendix B of the petition, are denoted by "P. App. B——". All citations to the petition are denoted by "Pet. ——". The Second Circuit opinion is reported at 670 F.2d 1249; the District Court opinion is reported at 505 F. Supp. 659.

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BRIEF FOR RESPONDENTS IN OPPOSITION

Statement of the Case

The Court of Appeals correctly decided the legal issues in this case: First, was an agreement among the petitioners, the National Football League ("NFL") and 25 of its separately owned and operated member clubs (collectively referred to herein as the "NFL petitioners"), to prohibit themselves from providing any sports ownership capital and skill to other sports teams, subject to being tested under Section 1 of the Sherman Act?[2] The Second Circuit, reversing the District Court, answered "yes". Then, applying traditional rule of reason principles to the particular facts found below, the Court of Appeals determined that a violation of Section 1 had in fact occurred. In so doing, that Court relied upon the District Court's factual finding that the challenged agreement was severely anticompetitive in both purpose and effect—a finding nowhere mentioned in the petition before this Court:

> As the district court found, the cross-ownership ban "has a conceded anticompetitive intent and, in its impact on the NASL, will probably have an anticompetitive effect." 505 F. Supp. at 689 [P. App. B 96a].

P. App. A 13a, 670 F.2d at 1255.

That Section 1 of the Sherman Act is applicable to businessmen in commerce, absent some express exemption, and was properly applied to the concededly anticompetitive agreement at issue in this case, hardly seems debatable. The only real question presented by the petition to this Court is whether ultimately to grant the request of these multi-millionaire NFL team owners for that express exemption from Section 1 on the theory that "[t]he operating principles of such lawful ventures [*i.e.*, sports leagues], developed by agreement among the joint venturers themselves, should not be subject to *ad hoc* judicial review as

2. Section 1 of the Sherman Act is quoted at p. 2 of the petition.

though they were agreements and conspiracies among economically independent persons" (Pet. 11). This quest for Section 1 immunity has consistently been denied them by this Court, a dozen lower courts and the United States Congress.

The NFL petitioners can continue their search for legislative immunity in Congress, if so advised, but this Court should not grant *certiorari* to review long-settled antitrust principles.

The Facts

In October 1978, representatives of 28 independent entities (each entity being a separately-owned NFL team) were about to meet together in the classic "hotel room" to agree in writing (in a proposed amendment to the NFL Constitution, hereinafter referred to as the "cross-ownership ban") that: (i) no NFL team owners (or members of their families) could invest in a major professional sports team which competed with NFL teams; and (ii) if any such NFL team owner had an existing investment in such a competing professional sports team, such investment had to be divested by a date certain or that owner would be subject to draconian sanctions (P. App. A 2a, 11a-13a, 670 F.2d at 1250, 1254-55; P. App. B 30a-31a, 505 F. Supp. at 661-62).

This action was brought by the North American Soccer League ("NASL") and certain of its member clubs (collectively referred to herein as the "NASL respondents") against the NFL petitioners to enjoin continuation and/or enactment of the cross-ownership ban, including its divestiture requirement directed at the NASL respondents (*see infra* at 6-7), and to recover damages.

The background facts found below, as to which there is little dispute, are as follows. The NFL and NASL are both major professional sports leagues operating in the

United States (and, in the case of the NASL, Canada). The ultimate objective of both leagues and their individual member teams is to promote their respective sports and to generate interest and revenues among ticket-buying fans, advertisers and television broadcasters (P. App. A 3a, 670 F.2d at 1251). Over the last 15 years, since the inception of the NASL in 1968, competition between the NFL and NASL for the interest of, and revenues to be derived from, these fans, advertisers and broadcasters has increased substantially on both a team-versus-team and league-versus-league basis (P. App. A 6a-7a, 670 F.2d at 1252).[3]

However, there is no comparison between the relative economic strength and stability of the teams in the two leagues. The NFL petitioners, by their own admission, are the preeminent and most lucrative professional sports teams in the United States—witness their recently reported $2 billion television package.[4] By contrast, the NASL, which is the youngest and "weakest" (P. App. A 7a, 670

3. As the Second Circuit, based on the District Court's factual findings, summarized:

> NASL teams have become increasingly more effective competitors of the NFL teams. The two sports are somewhat similar. Their seasons substantially overlap. The teams have franchises from their respective leagues in the same locations and frequently use the same stadia. An increasing, although small, percentage of the public are switching their interest as fans and TV viewers from professional football to professional soccer, threatening to reduce revenue which NFL teams derive from gate receipts and TV broadcast rights. Competition between NFL and NASL teams has not only increased on an inter-league basis but also between individual NFL and NASL teams. On the league front both organizations compete for a greater share of finite national and regional TV broadcast and advertising revenues. At the local level NFL teams compete against NASL teams for greater fan support, gate attendance, and local broadcast revenues.

P. App. A 6a-7a, 670 F.2d at 1252.

4. *NFL TV Pact $2 Billion*, N.Y. Times, Mar. 23, 1982, at D23, col. 6.

F.2d at 1252-53) of the five major professional team sports leagues, "is struggling to achieve wider popularity and with it greater revenues" (P. App. A 6a, 670 F.2d at 1252). "To this point, [the NASL respondents have been] financially unsuccessful" (P. App. A 7a, 670 F.2d at 1252).

The NASL's uphill struggle continues and is both reflected by and has resulted in a substantial turnover in its franchise ownership.[5] "Consequently, the risk of investing in an NASL team is considerably greater than that of investing in the NFL" (P. App. A 6a, 670 F.2d at 1252). The high-risk nature of investment in a professional soccer team, together with the other special characteristics of sports team ownership, led both courts below to conclude that, for professional sports teams in general and the NASL in particular, "the market for and availability of capital investment is limited" (P. App. A 7a, 670 F.2d at 1253).[6] The history of sports team ownership, and particularly the massive trial evidence of the experience of NFL and NASL teams in seeking new sources of sports ownership capital and skill, further revealed that within this limited market, "individuals with experience in owning and operating sports teams tend to be the most sought-after potential owners" (P. App. A 8a, 670 F.2d at 1253). The NFL petitioners' cross-ownership ban, of course, is a naked restraint impacting directly upon this limited mar-

5. For example, just between the trial and argument of the appeal below, 8 of the NASL's 24 teams folded (P. App. A 7a, 670 F.2d at 1253). Two more have since collapsed.

6. In the words of the Second Circuit:

> In short, while capital may be fungible in other businesses, it is not fungible in the business of producing major league professional sports. Regardless of the risk involved in the venture, which may vary greatly from league to league, league members look not merely for money but for a compatible fellow owner, preferably having entrepreneurial sports skill, with whom the other members can operate their joint business enterprise.

P. App. A 8a, 670 F.2d at 1253.

ket, specifically restricting the investment decisions of the most "sought-after" portion thereof.[7]

The NFL team owners' petition is notable for its omission of several critical facts found below which formed the lynchpin of the Court of Appeals' opinion. The most important omission is the failure even to acknowledge that both lower courts had no trouble concluding that the cross-ownership ban was manifestly anticompetitive both in its purpose and in its effect on the NASL respondents (P. App. A 9a, 13a, 670 F.2d at 1254-55; P. App. B 96a, 505 F.Supp. at 689).

The history of the cross-ownership ban, evolving as it did from informal resolutions to a full-blown proposal to amend the NFL Constitution, is summarized in the opinion below (P. App. A 10a-13a, 670 F.2d at 1254-55). Suffice it to say here that the purpose of the ban was not only generally to deprive all other major professional sports teams of the capital and skill of NFL owners, but also was specifically directed at what was perceived by NFL owners to be a growing competitive challenge from NASL teams (P. App. A 13a, 670 F.2d at 1255; P. App. B 52a, 505 F.Supp. at 670). The NFL ban was intended to force two of the most important and respected owners in the NASL—Lamar Hunt (owner of the Dallas and, thereafter, Tampa Bay NASL teams and Kansas City NFL team) and the Robbie family (owners of the Fort Lauderdale NASL team and Miami NFL team)—to rid themeselves of their NASL

7. Although the NFL petitioners continue to insist that "capital is fungible" for sports team ownership, and erroneously state that the NASL respondents conceded that point (Pet. 19 n.11), it was, in fact, the NASL respondents' contrary position and proof that led the courts below to conclude that a limited market for sports ownership capital and skill exists—a factual finding that the NFL petitioners cannot contest before this Court. *Compare* the *full text* of Respondents' Court of Appeals Reply Brief, at 14 (attached hereto as Appendix A), *with* the out-of-context excerpt quoted by the NFL petitioners (Pet. 19 n.11).

franchises, and to prevent other NFL owners—the most successful professional team sports entrepreneurs in the United States—from ever again investing in an NASL team. In the Second Circuit's words:

> The purpose of the ban was to weaken the NASL and its member teams so that they could not compete as effectively against the stronger, more mature and lucrative NFL teams as they might be able to do with the aid of capital investment by NFL team owners.[8]

The other critical fact—again found by both lower courts and wholly ignored by the NFL petitioners—is that the NFL is comprised of 28 individual teams, each of which is a "separately owned, discrete legal entity which does not share its expenses, capital expenditures or profits with other [NFL] members . . . [and] derives separate revenues . . . which are not shared with other members" (P. App. A 5a, 670 F.2d at 1252; P. App. B 74a, 505 F.Supp. at 679-80). Thus, while NFL members participate jointly in many league matters, like members of all the other major professional team sports leagues, "[t]he NFL teams are separate economic entities engaged in a joint venture" (P. App. A 5a, 670 F.2d at 1252)—that joint venture, of course, being the league itself.

8. P. App. A 13a, 670 F.2d at 1255. The importance of NFL cross-owners to the NASL respondents was described in detail by the District Court:

> The presence of Hunt and the Robbie family as NASL owners has been of significant assistance to the league in attracting additional owners and capital, and in creating in the eyes of the media and the public an aura of stability and credibility for the NASL. Their departure . . . would have a significantly adverse effect upon the NASL.

P. App. B 48a, 505 F.Supp. at 668 (*quoted with approval at* P. App. A 9a, 670 F.2d at 1254).

Prior Proceedings

On these critical facts, there was no disagreement between the District and Circuit Courts below. Yet, the District Court, rejecting more than two decades of sports antitrust precedent, and more than 90 years of antitrust principles, ruled that the NFL petitioners should be regarded as a "single economic entity," rendering Section 1 of the Sherman Act inapplicable since it is limited to agreements among a plurality of actors (P. App. A 14a, 670 F.2d at 1255-56; P. App. B 85a-86a, 95a, 505 F.Supp. at 685, 688). Resting its decision on the "single economic entity" concept, the District Court erroneously concluded that "neither [the anticompetitive] intent nor effect [of the cross-ownership ban] falls within the Sherman Act" (P. App. B 96a, 505 F.Supp. at 689).

The Court of Appeals reversed, holding that the NFL petitioners are not entitled to any judicially-created special exemption from the antitrust laws and are, like all other businessmen, subject to Section 1 of the Sherman Act (P. App. A 16a-18a, 670 F.2d at 1256-58). Declaring that the cross-ownership ban is plainly subject to scrutiny under the rule of reason (P. App. A 21a, 670 F.2d at 1259), the Court of Appeals further concluded that the ban constitutes a violation of Section 1, since the uncontestable anticompetitive intent and effect of the ban far outweigh any supposed procompetitive benefits thereof (P. App. A 22a-27a, 670 F.2d at 1259-61).[9]

9. The NFL petitioners' subsequent request for a rehearing *en banc* was denied by the Second Circuit (P. App. C).

REASONS FOR DENYING THE WRIT

I

THE APPLICATION OF SECTION 1 OF THE SHERMAN ACT TO THE AGREEMENTS OF INDEPENDENT OWNERS OF PROFESSIONAL SPORTS TEAMS PRESENTS NO CONFLICT OR QUESTION WARRANTING REVIEW BY THIS COURT.

A review on writ of *certiorari* should be granted "only when there are special and important reasons therefor," such as where the decision presents a conflict within the Circuit Courts, a conflict with prior decisions of this Court, or "an important question of federal law which ha[s] not been, but should be, settled by this Court" (Rule 17, Supreme Court Rules).

None of these considerations warranting review on *certiorari* is present here. The reasons are clear: with the anomalous exception of baseball,[10] this Court, and all the other federal courts which have had an opportunity to do so, have uniformly applied the basic strictures of Section 1 of the Sherman Act to agreements among the members of professional sports leagues, including specifically the NFL petitioners,[11] on numerous occasions:

10. Unlike the other professional sports, professional baseball enjoys a long-standing, and concededly anomalous, immunity from application of the antitrust laws. *Flood* v. *Kuhn*, 407 U.S. 258 (1972); *Federal Baseball Club* v. *National League*, 259 U.S. 200 (1922).

11. *See, e.g., Radovich* v. *NFL*, 352 U.S. 445 (1957); *Smith* v. *Pro-Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978); *Hecht* v. *Pro-Football, Inc.*, 570 F.2d 982 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978); *Mackey* v. *NFL*, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977); *Los Angeles Memorial Coliseum Commission* v. *NFL* ("Coliseum III"), 519 F. Supp. 851 (C.D. Cal. 1981); *Los Angeles Memorial Coliseum Commission* v.

(footnote continued on next page)

As the Supreme Court long ago recognized, the Sherman Act by its terms applies to "*every*" combination or agreement concerning trade, not just certain types. *Chicago Board of Trade* v. *United States*, 246 U.S. 231, 238, 38 S.Ct. 242, 244, 62 L.Ed. 683 (1918). The theory that a combination of actors can gain exemption from §1 of the Sherman Act by acting as a "joint venture" has repeatedly been rejected by the Supreme Court and the Sherman Act has been held applicable to professional sports teams by numerous lesser federal courts. *See, e.g., Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 141-42, 88 S.Ct. 1981, 1985-86, 20 L.Ed.2d 98 (1968); *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593, 598, 71 S.Ct. 971, 974, 95 L.Ed. 1199 (1951); *Radovich* v. *National Football League*, 352 U.S. 445, 449-52, 77 S.Ct. 390, 392-94, 1 L.Ed.2d 456 (1957); *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 83 S.Ct. 1246, 10 L.Ed.2d 389 (1963); *Associated Press* v. *United States*, 326 U.S. 1, 65 S.Ct. 1416, 89 L.Ed. 2013 (1945); *Linseman* v. *World Hockey Association*, 439 F.Supp. 1315 (D. Conn. 1977); *Robertson* v. *National Basketball Association*, 389 F.Supp. 867 (S.D.N.Y. 1975); *Philadelphia World Hockey Club Inc.* v. *Philadelphia Hockey Club, Inc.*, 351 F.Supp. 462 (E.D. Pa. 1972); *Smith* v. *Pro-Football, Inc.*, 593 F.2d 1173 (D.C.Cir. 1978); *Mackey* v. *NFL*, 543 F.2d 606 (8th Cir. 1976), *cert. denied*, 434 U.S. 801, 98 S.Ct. 28, 54 L.Ed.2d 59 (1977); *Los Angeles Memorial Coliseum Commission* v. *NFL* ("Coliseum II"), 484 F.Supp. 1274 (C.D. Cal.), *rev'd on other*

NFL ("Coliseum II"), 484 F. Supp. 1274 (C.D. Cal.), *rev'd on other grounds*, 634 F.2d 1197 (9th Cir 1980); *Los Angeles Memorial Coliseum Commission* v. *NFL* ("Coliseum I"), 468 F. Supp. 154 (C.D. Cal. 1979); *Bowman* v. *NFL*, 402 F. Supp. 754 (D. Minn. 1975); *Kapp* v. *NFL*, 390 F. Supp. 73 (N.D. Cal. 1974), *appeal vacated*, 586 F.2d 644 (9th Cir. 1978), *cert. denied*, 441 U.S. 907 (1979) (hereinafter collectively referred to as the "*NFL Petitioners' Antitrust Liability Cases*").

grounds, 634 F.2d 1197 (9th Cir. 1980); *Los Angeles Memorial Coliseum* v. *NFL* ("Coliseum I"), 468 F.Supp. 154, 164 (C.D. Cal. 1979); *Bowman* v. *NFL*, 402 F.Supp. 754 (D.Minn. 1975); *Kapp.* v. *NFL*, 390 F.Supp. 73 (N.D.Cal. 1974), *appeal vacated*, 586 F.2d 644 (9th Cir. 1978), *cert. denied*, 441 U.S. 907, 99 S.Ct. 1996, 60 L.Ed.2d 375 (1979). *Cf. San Francisco Seals Ltd.* v. *National Hockey League*, 379 F.Supp. 966 (C.D. Cal. 1974); *Levin* v. *National Basketball Association*, 385 F.Supp. 149 (S.D.N.Y. 1974).

P. App. A 16a-17a, 670 F.2d at 1256-57. Few areas of the law are marked by such uniformity of decision. Only *affirmance* of the District Court's anomalous single economic entity ruling would have created any conflict.

Indeed, one recent lower court decision (in a case upholding a Section 1 attack by one of these same NFL petitioners here, the Oakland Raiders, against the others) expressly rejected the district court's single economic entity theory on legal grounds virtually identical to those relied upon by the Second Circuit below:

> In the first place, the argument, if valid, would prove too much. If the NFL must be treated as a single entity in this lawsuit simply because all its teams must cooperate to produce the League product, the NFL should be just as much a single entity—and hence just as incapable of violating section 1 of the Sherman Act—in cases challenging League restrictions on the acquisition of players. Yet such League rules have repeatedly been found to violate section 1.
>
> Secondly, organizations whose product is just as unitary as the NFL's and requires the same kind of cooperation from the organization's members, have been found to violate section 1 of the Sherman Act. . . .
>
> A third problem with the NFL's argument is that it seems to rest on a false premise—that the individual

> NFL clubs are not separate business entities whose products have an independent value.

Coliseum III, 519 F.Supp. at 583-84 (citations omitted).

The NFL petitioners now ask this Court to grant *certiorari*, reverse all of these precedents and adopt "more definitive guidelines" (Pet. 7) exempting the agreements of professional sports teams from Section 1 scrutiny on the theory that "the relevant economic entities are leagues, not teams" (Pet. 6). Specifically, the NFL petitioners assert that unless this Court exempts their agreements from "*ad hoc* judicial review as though they were agreements and conspiracies among economically independent persons," "confusions, conflicts and irrationalities" will result (Pet. 11).

We are at a loss to see where the confusion, much less irrationality, arises. It is certainly not in the courts. For in all the non-baseball cases cited and discussed by the NFL petitioners as examples of such confusion (Pet. 11-13), and in all the cases cited above by the Second Circuit, one uniform thread emerges: the agreements of professional sports leagues and their member teams unquestionably are subject to scrutiny under Section 1 in accordance with the rule of reason, which rule simply requires the courts to balance the procompetitive objectives of a restraint against its anticompetitive effects to determine whether, in light of all the surrounding circumstances, it is an unreasonable restraint of trade. *See, e.g., NFL Petitioners' Antitrust Liability Cases;* discussion *infra* at 17-19.

Application of the rule of reason to sports cases has resulted in no "havoc" (Pet. 7) of any kind. Where the courts have determined that the challenged conduct involved restraints enacted by sports leagues and their members without anticompetitive intent and effect, and that those restraints were reasonably required to effectuate the

operations of the league, the agreements have withstood scrutiny under the rule of reason. *See, e.g., Neeld* v. *NHL*, 594 F.2d 1297 (9th Cir. 1979); *Levin* v. *NBA*, 385 F.Supp. 149, 152-53 (S.D.N.Y. 1974); *San Francisco Seals, Ltd.* v. *NHL*, 379 F.Supp. 966, 971 (C.D. Cal. 1974); *Molinas* v. *NBA*, 190 F.Supp. 241 (S.D.N.Y. 1961). On the other hand, where, as here, the challenged restraint was adopted with an anticompetitive intent and effect, and with no proven procompetitive benefits, it has been stricken. P. App. A 13a, 26a-27a, 670 F.2d at 1255, 1261; *see also NFL Petitioners' Antitrust Liability Cases.*

The NASL respondents, of course, are just as much a sports league as the NFL petitioners, and certainly would not argue in support of a position which is incompatible with the legitimate interests of a professional sports league, as the NFL petitioners suggest (Pet. 16-17). Respondents are not confused in the least over the meaning of the long line of prior sports cases; and they are perfectly willing to have their agreements subjected to scrutiny under the rule of reason, since under that rule, legitimate restraints necessary for the operation of the league (such as scheduling, expansion, and other reasonable ownership determinations) should be (and have been) upheld. It is only anticompetitive restrictions, such as the cross-ownership ban, adopted with a specific and demonstrable anticompetitive purpose and effect, that run afoul of the rule of reason.

The patina of professional sports in general, and of football in particular, does not transport the NFL team owners to some special harbor, safe from the traditional antitrust scrutiny which applies to everyone else.[12]

12. The Department of Justice concurs. *See* Statement of Abbott B. Lipsky, Jr., Deputy Assistant Attorney General, Antitrust Division, to the United States House of Representatives, Committee on the Judiciary, Subcommittee on Monopolies and Commercial Law, dated July 14, 1981 (a copy of which is attached as Appendix B hereto):

> [T]he Department has, throughout the years, held consistently to the view that professional team sports are businesses and, as

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In an obvious effort to create the appearance of some "variance" with past decisions of this Court (Pet. 6), the NFL petitioners offer this Court the same erroneous view of the facts they presented to, and had rejected by, both courts below: to wit, they assert that the NASL respondents have sought by this lawsuit, and obtained from the Second Circuit, an order "*requir*[*ing*] the NFL [petitioners] to subsidize and strengthen teams in a directly competing league . . .", and *compelling* the NFL petitioners to "help a smaller competitor" (Pet. 6). This is transparently inaccurate.

No such compulsion was ever sought by the NASL respondents, nor was it in any way ordered by the Second Circuit. The elimination of the cross-ownership ban will not "force" any NFL owner to do anything. All that the NASL respondents have sought is to end a ban, self-imposed by the agreement of the individual NFL team owners, which ban would prevent Lamar Hunt, the Robbie family and other individual NFL team owners from making up their own respective minds as to the wisdom of owning an NASL team. If an NASL franchise is not deemed to be a desirable investment opportunity, an NFL team owner need not invest. All the Second Circuit has held is that it should be the free market, not a private anticompetitive agreement, that determines the supply of sports ownership capital and skill available for NASL franchises.

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such, should be held as fully accountable under the antitrust laws as is any other industry. In our view, the flexible principles that are embodied in the antitrust laws should apply to sports as they do to every other regulated segment of our economy [App. B at 5a]. * * *

[A]ntitrust courts have sufficient flexibility in a rule of reason analysis to take into account any special considerations that may be found to exist in [professional sports] [App. B at 8a]. * * *

[T]he willingness of the courts to use a rule of reason analysis where it is called for in cases involving professional sports effectively refutes any claim that the antitrust laws should not be allowed to play their intended role in this particular segment of our economy [App. B at 8a].

Further, the NFL petitioners' request for special treatment under the antitrust laws rests on two factual premises that have been conclusively rejected in the courts below: that the NFL and its members operate as one enterprise, without any meaningful competition among the NFL teams (Pet. 9); and that the only meaningful competition which takes place between petitioners and respondents is on a league vs. league, rather than a team vs. team basis (Pet. 11, 13-15 n. 7, 17).

The NFL petitioners close their eyes to the unequivocal findings below that: (i) each NFL team is a "separately owned, discrete legal entity" (P. App. A 5a, 670 F.2d at 1252); and (ii) "competition exists between NFL members in various respects" (P. App. A 20a, 670 F.2d at 1258). Similarly, the NFL petitioners ignore the express findings below concerning the intense and substantial local competition that exists between individual NFL and NASL teams located in the same region. It is this economic competition between individual teams which forms the basis of all the so-called league vs. league competition alluded to by the NFL petitioners (P. App. A 10a-11a, 670 F.2d at 1254). A New York sports fan, for example, does not buy an NFL ticket or an NASL ticket; he buys a ticket to see the NFL's New York Giants or the NASL's New York Cosmos. The desire to suppress this team vs. team competition, with its resulting impact upon the separate, unshared expenses, profits and losses of the individual NFL team owners, was found below to be the primary anticompetitive motivation for those NFL team owners, like Leonard Tose and Max Winter, who were the leading proponents of the cross-ownership ban (P. App. A 10a-11a, 670 F.2d at 1254).

Moreover, it is undisputed that the NFL petitioners have not organized themselves as a single entity to own and operate all of their teams. Rather, having chosen to avail themselves of the benefits of doing business as discrete business entities, the petitioners come within the de-

cisions of this Court which make it plain that they must bear the antitrust responsibilities which go along with that choice. *See, e.g., Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 141-142 (1968) ("since respondents Midas and International availed themselves of the privilege of doing business through separate corporations, the fact of common ownership could not save them from any of the obligations that the law imposes on separate entities").[13] Here, the individual NFL petitioners do not have any common ownership; thus, this Court's reasoning in *Perma Life* and *Timken* applies *a fortiori*.[14]

In sum, the Second Circuit was clearly within mainstream antitrust, simply restating the principles of numerous sports league cases, when it concluded that the independent NFL team owners had to play by the same antitrust rules as other joint venturing businessmen. Moreover, the NFL petitioners most obviously have survived and prospered despite the "havoc" and "confusion" of living under the antitrust laws. *Certiorari* is not necessary since the "definitive guidelines" the NFL petitioners allegedly seek already exist: sports team owners are subject to the antitrust laws; reasonable restraints needed to effectuate league play will be permitted; demonstrably anticompetitive restraints unnecessary to effectuate league

13. *See also, Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593, 598 (1951) (in which this Court rejected a claim that the "joint venture" status of a business association could be used to shield from Section 1 scrutiny anticompetitive agreements between the legally separate persons comprising the association).

14. Nor does the NFL petitioners' asserted "need" to engage in joint activity provide any basis for granting them Section 1 immunity in this case. In numerous decisions involving similar joint ventures which were "necessary" for the creation of a "joint" product, the courts have consistently applied Section 1 of the Sherman Act to restraints agreed to by the joint venturers. *See, e.g., Broadcast Music, Inc.* v. *CBS, Inc.*, 441 U.S. 1 (1979); *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963); *Associated Press* v. *United States*, 326 U.S. 1 (1945).

play will be stricken;[15] and Congress' doors are open to the petitioners should they continue to seek an exemption from these "guidelines." The NFL petitioners simply don't want to understand that which all other sports team owners—and businessmen—have no trouble comprehending: namely, that absent congressional exemption, the antitrust laws apply to all commerce and businessmen. Denial of *certiorari* will help rid them of this "confusion."

II

THE SECOND CIRCUIT'S CONDEMNATION OF THE CROSS-OWNERSHIP BAN UNDER THE RULE OF REASON WAS CONSISTENT WITH, AND MANDATED BY, PRIOR DECISIONS OF THIS COURT.

The Courts below uniformly found that the NFL petitioners' cross-ownership ban has an express anticompetitive purpose and effect; thus, the Second Circuit's conclusion that the ban violates Section 1 of the Sherman Act represents a routine application of this Court's decisions delineating the appropriate inquiry under the rule of reason. Under the rule of reason, the decisive issue is "whether the challenged agreement is one that promotes competition or one that suppresses competition," an inquiry which entails an analysis of the purpose and effect of the restraint to determine whether, on balance, its supposedly procompetitive objectives (if any) outweigh its anticompetitive effects. *National Society of Professional Engineers* v.

15. Indeed, even the commentators relied upon by the NFL petitioners (Pet. 9-10 n.6) state that a league's ownership approval requirements should be reviewable under the antitrust laws where the owner is "disapproved for anticompetitive reasons, as where a league rejects a former promoter of a rival league solely for the purpose of punishing him for his prior efforts"—a hypothetical which bears remarkable similarity to the cross-ownership ban. *See* J. C. Weistart & C. H. Lowell, *The Law of Sports*, § 5.11, at 756-57 (1979).

United States, 435 U.S. 679, 691 (1978); *Continental TV, Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36, 49-51 (1977).

If a group restraint is found to be motivated by a specific anticompetitive intent, it is invalid under the rule of reason.[16] Similarly, a contract, combination or conspiracy which restrains trade is invalid under Section 1 of the Sherman Act unless it has offsetting procompetitive effects. *See, e.g., National Society of Professional Engineers*, 435 U.S. at 688. Under these tests, the NFL petitioners' cross-ownership ban could not have survived antitrust analysis:

> As the district court found, the cross-ownership ban "has a conceded anticompetitive intent and, in its impact on the NASL, will probably have an anticompetitive effect." 505 F.Supp. at 689 [P. App. B 96a].
>
> • • •
>
> [T]he voluminous trial record discloses that the NFL's cross-ownership ban would foreclose NASL teams from continued enjoyment of and access to a significant segment of the market supply of sports capital and skill, thereby restraining at least some NASL teams from competing effectively against NFL teams for fan support and TV revenues. Any resulting restraint would benefit not merely the NFL as a league but those NFL teams that would be otherwise weakened individually and disproportionally (as compared with other NFL teams) by competing NASL teams.
>
> • • •
>
> [The cross-ownership ban's asserted] procompetitive effects are not substantial and are clearly outweighed

16. *See, e.g., McLain* v. *Real Estate Board*, 444 U.S. 232, 243 (1980); *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 436 n. 13 (1978); *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464, 468-69 (1962); *Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594, 614 (1953); *United States* v. *Columbia Steel Co.*, 334 U.S. 495, 522 (1948).

> by its anticompetitive purpose and effect. Its net effect is substantially to restrain competition, not merely competitors. It therefore violates the rule of reason.

P. App. A 13a, 27a, 670 F.2d at 1255, 1259, 1261 (citations omitted).

The NFL petitioners criticize the Second Circuit's rule of reason analysis on the basis of: (i) the Court of Appeals' discussion of the market for sports ownership capital and skill, and (ii) its discussion of less restrictive alternatives available to the NFL petitioners. Neither of these arguments provides any basis for granting *certiorari* herein.

A. The Court of Appeals Properly Dealt With the Market Issue.

Having to concede the cross-ownership ban's anticompetitive intent and effect, as well as its lack of any procompetitive purpose, the NFL team owners invent in their petition for *certiorari* a supposed need to define with mathematical certainty the precise boundaries of the market in which such a restraint occurs. The NFL petitioners thus challenge the Court of Appeals' discussion of the market for sports ownership capital and skill on the ground that the discussion allegedly assessed "seller characteristics," rather than "product characteristics" (Pet. 18-21). Specifically, they accuse the Second Circuit of ignoring this Court's teachings in *Brown Shoe Company* v. *United States*, 370 U.S. 294 (1962) (a Section 7 Clayton Act case), and of failing to determine "where the NASL can practicably turn for supplies of investment capital" (Pet. 20-21). The NFL petitioners are wrong both generically and specifically.

The Court of Appeals, in discussing the market in which the cross-ownership ban occurred, in fact applied the practical indicia set forth by this Court in the *Brown Shoe*

decision (P. App. A 24a-26a, 670 F.2d at 1260-61). Precisely because it did review and rely upon the voluminous record evidence which addressed the question of "where the NASL can practicably turn for supplies of investment capital" (rather than on petitioners' *ipse dixit* assertions), the Court of Appeals concluded that the potential ownership sources available to the NASL respondents were significantly limited in scope and decidedly distinct from the general capital markets available to ordinary industrial corporations seeking passive investment dollars. The Court of Appeals, relying on the factual findings of the District Court, thus stated:

> [A]n owner may in practice sell his franchise only to a relatively narrow group of eligible purchasers, not to any financier. The potential investor must measure up to a profile having certain characteristics. Moreover, on the supply side of the sports capital market the number of investors willing to purchase an interest in a franchise is sharply limited by the high risk, the need for active involvement in management, the significant exposure to publicity that may turn out to be negative, and the dependence on the drawing power and financial success of the other members of the league. The record thus reveals a market which, while not limited to existing or potential major sports team owners, is relatively limited in scope and is only a small fraction of the total capital funds market.

P. App. A 24a-25a, 670 F.2d at 1260; *see also, supra* n.6 and accompanying text. These factors clearly limit the potential sources of sports ownership capital and skill available to the NASL respondents,[17] and are completely consistent

17. Of course, if the market for such ownership resources were not so very limited, the NASL respondents would hardly have spent so much time and money litigating this case to keep the resources of Mr. Hunt and the Robbies and to have the chance to interest other NFL team owners. As Steve Rosenbloom, the son of the former

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with the *Brown Shoe* criteria (assuming, *arguendo*, that those Section 7 Clayton Act criteria are even relevant to a Section 1 Sherman Act conspiracy concededly involving an anticompetitive purpose and effect, and no procompetitive aspects).

Rather than imposing antitrust liability "irrespective of market consequences," as the NFL petitioners assert (Pet. 23), the Court of Appeals expressly determined that the portion of the sports ownership capital and skill market foreclosed by the cross-ownership ban was "significant";[18] and agreed with the District Court's unavoidable finding that the ban had a concededly anticompetitive purpose and effect (P. App. A 13a, 25a-26a, 670 F.2d at 1255, 1260-61). Indeed, as the Second Circuit stated:

> [T]he existence of such a submarket and the importance of the function of existing team owners as sources of capital in that market are implicitly recognized by the defendants' proven intent in adopting the cross-ownership ban. If they believed, as NFL now argues, that all sources of capital were fungible substitutes for

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owner of the NFL's Baltimore Colts, testified concerning his family's experience in attempting to sell the Colts:

> As I say from experience, it is a small market, because it was no secret we might have sold the thing and that we were talking to people. A few people came around, and those that came around never came up with any concrete proposal. I would take that experience and say, theoretically or practically, or realistically, there didn't seem to be a large market for it.

P. App. A 25a n.7, 670 F.2d at 1260 n.7.

18. As the Court of Appeals recognized:

> The attractiveness of existing owners of major sports teams as sources of potential capital is further evidenced by the large number of members of major sports leagues who control or own substantial interests in members of other leagues. The record reveals some 110 instances of cross-ownership and some 238 individuals or corporations having a 10% or greater interest in other teams. Over the last 13 years there have been 16 cross-ownerships between NFL and NASL teams.

P. App. A 9a, 670 F.2d at 1253.

> investment in NASL sports teams and that the ban would not significantly foreclose the supply of sports capital, they would hardly have gone to the trouble of adopting it.

P. App. A 25a, 670 F.2d at 1260-61.

With a demonstrable anticompetitive purpose and effect evidenced by the record, there was no reason for the Second Circuit to have to specify, as the petitioners contend (Pet. 21-23), the exact numerical percentage of the obvious market foreclosed by the cross-ownership ban (P. App. A 25a-26a, 670 F.2d at 1260-61). The only purpose for measuring market foreclosure in the first place is to determine whether or not there is an anticompetitive effect,[19] and there was no dispute by either court below that the cross-ownership ban had such an effect in this case (P. App. A 13a, 670 F.2d at 1255; P. App. B 96a, 505 F.Supp. at 689).[20]

19. The vertical restraint cases cited by the NFL petitioners for the proposition that market foreclosure should be expressed in numerical terms (Pet. 21 n.13) are not only inapposite to the horizontal agreement among members of a joint venture at issue in this case (P. App. A 20a-22a, 670 F.2d at 1258-59), but are entirely consistent with the principle that precise quantitative assessments of market foreclosure are merely one means for determining whether a particular restraint is likely to cause the type of anticompetitive effects condemned by the antitrust laws and found by both lower courts below.

20. Boycotts of this kind have repeatedly been struck down whenever the resource being withheld placed the victims of the boycott at a competitive disadvantage. *See, e.g., Associated Press*, 326 U.S. at 17-19 (*per se* rule applied to a group boycott depriving competitors of certain news gathering facilities even though other sources of news gathering were found to be available; a proposed "indispensability" test was expressly rejected by this Court); *United States* v. *Insurance Board of Cleveland*, 188 F.Supp. 949, 959 (N.D. Ohio 1960) (holding unlawful a boycott by insurance brokers of mutual companies that merely denied them access to some of the most profitable and best insurance agents available); *Far Eastern Coconut Co.* v. *Sun Ripe Coconut Corp.*, 1979-2 Trade Cas. ¶62,878 (E.D. N.Y. 1979) (holding that a boycott by two coconut dealers of a jobber could violate Section 1 of the Sherman Act even though the dealers supplied less than 5% of the jobber's purchases).

B. The Court of Appeals Correctly Considered the Availability of Less Restrictive Alternatives in Evaluating the Cross-Ownership Ban Under the Rule of Reason.

The NFL petitioners also fault the Court of Appeals for purportedly requiring them to come forward with proof that their supposedly legitimate objectives could not be achieved by less restrictive means (Pet. 23-25). Again, the NFL petitioners simply ignore this Court's prior decisions.

The less restrictive alternative analysis applied by the Court of Appeals was entirely consistent with this Court's decision in *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 357 (1963), and other governing case law.[21] The decision in *Silver* reaffirmed the rule that where, as here, an established *per se* rule—such as that ordinarily applied to group boycotts (*see, e.g., Associated Press*, 326 U.S. 1 (1945))—is not applied because of an asserted need for self-regulation (P. App. A 19a-22a, 670 F.2d at 1258-59), the restraint at issue can only be justified when it is limited "to the extent necessary." 377 U.S. at 400, 402. This rule has repeatedly been applied to boycotts and similar restraints agreed to by the member teams of professional sports leagues, including the NFL.[22]

21. *See, e.g., Hennessey* v. *NCAA*, 564 F.2d 1136, 1153-54 (5th Cir. 1977); *Copper Liquor, Inc.* v. *Adolph Coors Co.*, 506 F.2d 934, 942-43 (5th Cir. 1975); *Worthen Bank & Trust Co.* v. *National BankAmericard, Inc.*, 485 F.2d 119, 130 (8th Cir. 1973), *cert. denied*, 415 U.S. 918 (1974); *Siegel* v. *Chicken Delight Inc.*, 448 F.2d 43, 51 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972); *Sandura Co.* v. *FTC*, 339 F.2d 847, 856 (6th Cir. 1964); *United States* v. *Addyston Pipe & Steel Co.*, 85 F. 271, 282 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899).

22. *See, e.g., Smith* v. *Pro-Football, Inc.*, 593 F.2d 1173, 1187-89 (D.C. Cir. 1978); *Mackey* v. *NFL*, 543 F.2d 606, 620 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977); *Linseman* v. *WHA*, 439 F.Supp. 1315, 1322-23 (D. Conn. 1977); *Denver Rockets* v. *All-*

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The rule of reason analysis applied by the Second Circuit to strike down the cross-ownership ban was thus a routine application of the most fundamental antitrust principles and is completely consistent with the prior decisions of this Court. There is no need to grant *certiorari* to review such well-established principles.

III

THE NFL PETITIONERS' REQUEST FOR IMMUNITY FROM SECTION 1 OF THE SHERMAN ACT SHOULD BE DIRECTED TO CONGRESS, NOT TO THIS COURT.

The NFL petitioners seek nothing less than to have this Court legislate an exemption from Section 1 of the Sherman Act for the owners of professional sports teams. Somehow it has taken root in their collective psyche that, as owners of helmeted and padded gladiators, ordinary business rules should not apply to them—they should be above it all. Their petition is of a piece with this attitude. They assert

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Pro Management, Inc., 325 F.Supp. 1049, 1065 (C.D. Cal.), *stay vacated sub nom., Haywood* v. *NBA*, 401 U.S. 1204 (1971).

Moreover, the Second Circuit's ruling that "the existence of less restrictive alternatives is obviously of vital concern in evaluating putatively anticompetitive conduct" (P. App. A 22a, 670 F.2d at 1259) is, contrary to petitioners' assertions (Pet. 23-25), perfectly consistent with the prior case law, including the Third Circuit's decision in *American Motor Inns, Inc.* v. *Holiday Inns, Inc.*, 521 F.2d 1230 (3rd Cir. 1975). In *American Motor Inns*, the court required the restraint before it to be "fairly necessary" or "reasonably necessary" to protect the legitimate interests of the defendants (521 F.2d 1248-49). However, it also acknowledged that a more stringent, less restrictive alternative test has been applied where an exception to a *per se* rule was at issue (521 F.2d at 1249)—precisely the situation herein. Indeed, the Second Circuit below expressly relied upon its earlier decision in *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263, 303 (1979), *cert. denied*, 444 U.S. 1093 (1980), as authority for its less restrictive alternative analysis (P. App. A 22a, 670 F.2d at 1259). The decision in *Berkey*, in turn, held that such analysis was fully supported by the decision of the Third Circuit in *American Motor Inns.* 603 F.2d at 303.

that the antitrust laws are "entirely foreign to the sports league business relationship" (Pet. 7); that application of the antitrust laws to them creates "judicial havoc" (Pet. 7); that the federal courts are "unable to cope" with the mystique of a professional football league (Pet. 7); that lower courts have "groped in vain" (Pet. 8) for guidance and "invoke inappropriate antitrust principles designed for horizontal business competitors . . ." (Pet. 9). They cry out for "direction from this Court" (Pet. 8). But the "direction" they seek is not truly guidelines, for they abjure "*ad hoc* judicial review" (Pet. 11) conducted in the "vagrant manner" (Pet. 17) required for weighing pro- and anticompetitive effects. Rather, the "direction" the NFL petitioners seek is to an exit from Section 1 of the Sherman Act altogether because, in their view, "the relevant economic entities are leagues, not teams" and a Section 1 conspiracy requires "separate economic entities" (Pet. 6).

This Court has repeatedly rejected all attempts by antitrust defendants, such as the NFL petitioners, to argue that the special problems of their industries, or supposed "public policy" considerations unrelated to competition, provide a basis for the judiciary creating its own special interest exceptions to the Congressionally-mandated policy in favor of unrestrained competition. *See, e.g., Arizona* v. *Maricopa County Medical Society*, —— U.S. ——, 50 U.S.L.W. 4687, 4692 (1982); *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 692 (1978); *United States* v. *Topco Associates, Inc.*, 405 U.S. 596, 610-12 (1972); *Fashion Originators' Guild of America, Inc.* v. *FTC*, 312 U.S. 457, 465 (1941). As this Court explained in *National Society of Professional Engineers*:

> [T]he purpose of the [rule of reason] analysis is to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest, or in the in-

> terest of the members of an industry. Subject to the exceptions defined by statute, that policy decision has been made by the Congress.[23]

Similarly, in *Topco*, this Court rejected a claim by members of an association of small supermarkets that they should be able to allocate territories pursuant to a cooperative buying arrangement because such a restraint allegedly was in the public interest in that it enabled the association members to compete more effectively against larger national and regional chains:

> The District Court determined that by limiting the freedom of its individual members to compete with each other, Topco was doing a greater good by fostering competition between members and other large supermarket chains. But, the fallacy is that Topco has no authority under the Sherman Act to determine the respective values of competition in various sectors of the economy. On the contrary, the Sherman Act gives to each Topco member and to each prospective member the right to ascertain for itself whether or not competition with other supermarket chains is more desirable than competition in the sale of Topco-brand products.
>
> • • •
>
> There have been tremendous departures from the notion of a free-enterprise system as it was originally conceived in this country. These departures have been the product of congressional action and the will of the people. If a decision is to be made to sacrifice competition in one portion of the economy for greater competition in another portion, this too is a decision that

23. 435 U.S. at 692. *See also, Fashion Originators' Guild*, 312 U.S. at 465 (group boycott of retailers who sold "pirated" dress designs could not be justified on the ground that competition from pirated designs violated state law and was not in the public interest, since it was for Congress, not private parties, to determine whether a particular type of competition was desirable).

> must be made by Congress and not by private forces or by the courts. Private forces are too keenly aware of their own interests in making such decisions and courts are ill-equipped and ill-situated for such decision-making.

405 U.S. at 610-12.

More recently, this Court has expressly noted the inappropriateness of the judiciary resolving significant competition policy issues, such as those presented by the NFL petitioners' Section 1 immunity request:

> The choice we are urged to make is a matter of high policy for resolution within the legislative process after the kind of investigation, examination, and study that legislative bodies can provide and courts cannot. That process involves the balancing of competing values and interests, which in our democratic system is the business of elected representatives. Whatever their validity, the contentions now pressed on us should be addressed to political branches of the Government, to the Congress and the Executive, and not to the courts.

Texas Industries, Inc. v. *Radcliff Materials, Inc.*, 451 U.S. 630, 101 S.Ct. 2061, 2070 (1981), *quoting, Diamond* v. *Chakrabarty*, 447 U.S. 303, 317 (1980).

Interestingly enough, having lost in the Court of Appeals below, the NFL petitioners did in fact finally bring their Section 1 immunity request to the proper forum, the Congress of the United States. On February 5, 1982, a mere six days after the Second Circuit found them guilty of deliberately suppressing the competition presented by NASL teams, the NFL petitioners submitted to the House Judiciary Committee proposed legislation which would grant their Section 1 immunity request and absolve them retroactively from all antitrust liability in this and other

pending cases. Congress has been totally unreceptive to date.[24]

If Congress has not seen fit to overrule more than a quarter of a century of decisions, including this Court's seminal decision in *Radovich*, holding professional sports team owners, including these NFL petitioners, subject to the rule of reason under Section 1 of the Sherman Act, this Court should not do so now.[25] The policy which Congress has declared in the Sherman Act is that unrestrained competition is to be the rule of trade. When Congress has wanted to grant a specific industry an exemption from this mandate, it has expressly done so—as it did twice in the past when the NFL petitioners sought limited antitrust exemptions for their joint television negotiations and the NFL-AFL merger (*see* 15 U.S.C. §§ 1291-1295). This Court should not grant *certiorari* and now take on Congress' exclusive policy-making prerogative by entertaining the NFL petitioners' Section 1 immunity request.

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24. *See NFL Fails to Get Antitrust Bill Introduced*, The Washington Post, Apr. 2, 1982, at D1, col. 1; *NFL Presses for Antitrust Exemption*, N.Y. Times, Apr. 4, 1982, Sec. 5 at 8, col. 3 (attached hereto as Appendices C and D).

25. *Cf. Flood* v. *Kuhn*, 407 U.S. 258 (1972). In *Flood*, this Court determined that since years earlier it had held, in an admittedly anomalous ruling, that baseball teams are exempt from the antitrust laws, any change in that status must be made by Congress. The same principle applies *a fortiori* in this case, since the courts have consistently held that the NFL petitioners and other sports team owners are subject to Section 1 of the Sherman Act, and Congress has not granted them an exemption for the conduct here in issue.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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July 15, 1982

APPENDIX A

Excerpt from Respondents' Court of Appeals Reply Brief (Pages 14-15)

existence of a limited market for sports ownership capital and skill (NASL Pl. Br. 13-17, 68-76); (ii) the District Court's failure to define this market was based on fundamental errors of law and fact (NASL Pl. Br. 68-76); and (iii) even if there were no relevant market for sports ownership capital and skill, the cross-ownership ban would still be an unlawful restraint of trade because of its conceded anticompetitive purpose and effect in the major professional team sports market (Op. at A2011; NASL Pl. Br. 68).[18] The NFL defendants have offered only three words in response: "capital is fungible" (NFL Def. Br. 30).

No one, of course, would dispute the fact that capital is fungible, and if the plaintiffs were industrial corporations selling bonds on the New York Stock Exchange, they would have an enormous capital market to approach. The NASL plaintiffs, however, are not industrial corporations and they are not just looking for passive investment dollars. They are sports teams looking for qualified owners, and the market to buy and sell team sport franchises—as NFL Commissioner Rozelle testified (Tr. 2866 Vol. XIV; Tr. 3215, 3217 Vol. XV)—is very different from, and far more limited than, the general capital markets described by the defendants.[19]

18. Indeed, the District Court found that the forced departure of Lamar Hunt and the Robbies alone would have a seriously adverse effect on the competitive status of the NASL plaintiffs (Op. at A1960). The NFL defendants' suggestion that Mr. Hunt would be just as likely to sell his NASL team as his NFL team in order to comply with the cross-ownership ban borders on the absurd; they have simply taken an isolated quote about Mr. Hunt's willingness to consider the sale of any asset at the right price (NFL Def. Br. 7, n.7, citing Hunt, Tr. 1196, 1486-90 Vol. X), while neglecting the fact that on the very same page, Mr. Hunt stated quite plainly that he has no desire to sell his NFL franchise (Hunt, Tr. 1490 Vol. X).

19. As witnesses for both the NASL plaintiffs and NFL defendants consistently agreed, a major professional team sports league cannot long survive without strong individual team ownership (NASL Pl. Br. 11-13). This is particularly true for a relatively immature league like the NASL (NASL Pl. Br. 9-11). Indeed, just since the filing of this lawsuit in September of 1978, 17 of the 21 NASL plaintiff teams have either relocated, experienced a major ownership transfer or gone out of business entirely.

Appendix A

The NASL plaintiffs have never contended that the potential supply of sports owners is limited to Lamar Hunt and the Robbie family, the NFL defendants, or even all major professional sports team owners (although the latter do constitute the entire supply of owners currently in the market). However, all of the record evidence—including the NFL defendants' own experience (NASL Pl. Br. 22, 73-74)—clearly demonstrates that the actual and potential supply of qualified franchise owners that does exist is extremely limited (NASL Pl. Br. 9-23, 68-76),[20] and that any cross-ownership ban by the NFL defendants would have a significantly adverse effect on the NASL plaintiffs (Op. at A1960). The NFL defendants' brief simply ignores these record facts.

III.

THE NFL DEFENDANTS FAIL TO ADDRESS THE CONTROLLING AUTHORITIES AND RECORD EVIDENCE WHICH DEMONSTRATES THAT THE CROSS-OWNERSHIP BAN IS, AT THE VERY LEAST, AN UNREASONABLE RESTRAINT OF TRADE.

Applying Section 1 of the Sherman Act to the cross-ownership ban, it quickly becomes evident why the NFL defendants have fought so hard to preserve their single economic entity defense: the ban plainly violates Section 1. The group boycott decisions (which the NFL defendants never discuss in their brief) demonstrate that the ban is a classic *per se* violation (NASL Pl. Br. 76-82). On this ground alone, a violation should be found.

20. Notwithstanding defendants' repeated efforts to understate the importance of cross-owners, it is undisputed that at the time this action was commenced, 12 NASL franchises were owned in whole or part by cross-owners and fully 18 of the NFL's 28 teams had some prior or concurrent ownership interest in another professional team sport. Nor is it disputed that the owners of 10 of the 21 NHL franchises, 13 of the 23 NBA franchises, and 7 of the 26 MLB franchises simultaneously own interests in other professional sports teams today (NASL Pl. Br. 16-17).

APPENDIX B

[LETTERHEAD OF]

U.S. DEPARTMENT OF JUSTICE

Washington, D.C. 20530

STATEMENT

OF

ABBOTT B. LIPSKY, JR.
DEPUTY ASSISTANT ATTORNEY GENERAL
ANTITRUST DIVISION

BEFORE THE

SUBCOMMITTEE ON
MONOPOLIES AND COMMERCIAL LAW

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES

CONCERNING

PROFESSIONAL SPORTS AND THE
ANTITRUST LAWS

JULY 14, 1981

Appendix B

Mr. Chairman and Members of the Subcommittee:

I am pleased to testify today on the antitrust aspects of professional sports. Professional sports are an important and highly visible part of our society. Interests in sports vary tremendously—they include those of the owners, the players, the fans, and communities in general. Sports have educational, moral, and, of course, economic aspects. With respect to the latter, antitrust has a most important role to play, and I think the Subcommittee's interest in the area is both warranted and particularly timely.

The purpose of the Subcommittee's inquiry, as I understand it, is to examine a wide range of issues in professional sports—and in particular, professional team sports—that appear to give rise to antitrust concerns. The Department has had but limited direct experience in this area, and while I cannot represent having substantial expertise in this area, we are happy to contribute what we can to the Subcommittee's review.

We have brought very few cases in the sports field. They have involved boxing,[1] wrestling,[2] trotting racing,[3] and professional football;[4] all of these cases were brought before 1960. In addition, and particularly in recent years, the Department has closely monitored private litigation and proposed league mergers involving professional sports

Fairly intense antitrust litigation in the private sector, by parties whose interests are most directly affected, explains the Department's limited history of direct enforcement activity in the sports area. We must make the best

1. *United States* v. *International Boxing Club*, 348 U.S. 236 (1955).

2. *United States* v. *National Wrestling Alliance*, 1956 Trade Cases, ¶ 68,507 (S.D. Iowa 1956) (consent decree).

3. *United States* v. *United States Trotting Association*, 1960 Trade Cases, ¶ 69,761 (E.D. Ohio 1960).

4. *United States* v. *National Football League*, 116 F. Supp. 319 (E.D. Pa. 1953).

use of limited enforcement resources that we can, and duplication of private litigation is generally not a wise investment.

However, the Department has, throughout the years, held consistently to the view that professional team sports are businesses and, as such, should be held as fully accountable under the antitrust laws as is any other industry. In our view, the flexible principles that are embodied in the antitrust laws should apply to sports as they do to every other unregulated sector of our economy. We are by no means alone in this view; with the exception of professional baseball, the courts have consistently held that the antitrust laws fully apply to professional sports. *See, e.g., Flood* v. *Kuhn*, 407 U.S. 258, 282-83 (1971); *Radovich* v. *National Football League*, 352 U.S. 445 (1957); *San Francisco Seals Ltd.* v. *National Hockey League*, 379 F. Supp. 966, 968 (C.D. Cal. 1974).

The important question, of course, is just *how* the antitrust laws should apply to professional sports. Over the years, representatives of professional team sports have argued that sports have unique characteristics which set them apart from other businesses and require sports to operate under commercial rules that differ from those applied to other businesses. The response of the Department to this argument has been consistent over the years: the antitrust laws are sufficiently flexible to accomodate whatever unusual or unique business characteristics might exist in the professional sports industry.

We recognize that sports do, in fact, have some unique characteristics. A team may be likened to a business firm in that it is an economic entity, presumably in business to make a profit. Yet unlike the typical firm, a single team acting alone cannot offer the basic product to the public—it must cooperate with other teams to present an athletic contest that people will pay to observe.

Appendix B

Thus, sports require some consultation and cooperation among the teams in a given league in order for each to exist. For example, mutual cooperation and agreement are required with respect to the rules of play and the scheduling of games during a long season. However, an admitted need for some cooperation does not necessarily justify any and all agreements among the teams in a league, and several types of league rules remain controversial. For example, league claims that rules regarding player employment and the sale or transfer of player services among teams are necessary to protect weaker teams and to preserve competitive balance or strength throughout a given league have, not surprisingly, been challenged by those whose economic interests are primarily affected by such rules—the players. In addition, league representatives have defended rules regulating the admission of new teams and the relocation of teams against the argument that such rules unreasonably limit competition between teams and reduce fan alternatives.

Major questions exist as to whether, and to what extent, protecting the financial stability of teams and competitive balance within a league requires special treatment under the antitrust laws. Judicial response has indicated no strong sympathy to requests for special treatment; rather, the courts have tried to apply straightforward antitrust rules in a manner that accommodates the particular characteristics of professional team sports while promoting the important competitive objectives of the antitrust laws.

Perhaps the most basic of these antitrust rules is the "rule of reason", under which the alleged anticompetitive features of a practice or agreement are measured and weighed against procompetitive justifications. If, after such analysis, the agreement can be said to be reasonable under the circumstances, and no more restrictive than necessary, then it will not be held to be a violation of the antitrust laws.

Appendix B

This standard has been applied in recent years in private litigation involving player restraints. Cases have challenged the National Football League's rules relating to the player draft, tampering, the player reserve list, the Standard Player Contract and the so-called "Rozelle Rule", which formerly governed the compensation due a team that had lost a "free agent" to another team. In these cases, the courts have identified the purchase and sale of players' services as an area of competition worthy of antitrust protection and determined that various player rules, either alone or in combination with each other, were unreasonable restraints of trade as they existed and were applied at the time they were challenged. *See Smith* v. *Pro Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978); *Kapp* v. *National Football League*, 586 F.2d 644 (9th Cir. 1978), *cert. denied*, 441 U.S. 907; *Mackey* v. *National Football League*, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977).

The appellate courts gave careful consideration to the asserted justifications for the challenged rules. In evaluating the Rozelle Rule, for example, the *Mackey* court stated: "We do recognize, as did the district court, that the NFL has a strong and unique interest in maintaining competitive balance among its teams. The key issue is thus whether the Rozelle Rule is essential to the maintenance of competitive balance, and is no more restrictive than necessary."[5] The court went on to analyze in some detail the nature and operation of the Rozelle Rule before holding that the Rule, as then enforced, unreasonably restrained trade in violation of the Sherman Act. But the court noted that "our disposition of the antitrust issue does not mean that every restraint on competition for players' services would necessarily violate the antitrust laws."[6]

5. *Mackey* v. *National Football League*, 543 F.2d 606, 621 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977).

6. 543 F.2d at 623.

Appendix B

Without attempting to judge the correctness of the outcome of these player restraint cases, I do endorse the method used by the courts in approaching their task. And I would point out that the willingness of the courts to use a rule of reason analysis where it is called for in cases involving professional sports effectively refutes any claim that the antitrust laws should not be allowed to play their intended role in this particular segment of our economy.

With this background, I would like to turn to baseball's exemption from the antitrust laws. Baseball received its special status as a result of the Supreme Court's decision in *Federal Baseball Club* v. *National League*,[7] that baseball was not "trade or commerce" within the meaning of the Sherman Act, nor was it interstate in nature. The Court has since rejected both of the rationales of its *Federal Baseball* decision. In *Flood* v. *Kuhn*,[8] the Court's most recent statement on the subject, the Court described the *Federal Baseball* decision as "an aberration." Nevertheless, it reaffirmed the *Federal Baseball* decision, but did so solely on the principle of *stare decisis* and stated that any change in the status of baseball under the antitrust laws would have to be made by Congress.

It has been the position of the Antitrust Division for some time that baseball's exemption is an anachronism and should be eliminated. I reaffirm that position today. I know of no economic data or other persuasive justification for continuing to treat baseball differently from the other professional team sports, all of which are now clearly subject to the antitrust laws. As I stated earlier, antitrust courts have sufficient flexibility in a rule of reason analysis to take into account any special considerations that may be found to exist in baseball.

I would be pleased to try to answer any questions that the Subcommittee has.

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7. *Federal Baseball Club* v. *National League*, 259 U.S. 200 (1922).

8. *Flood* v. *Kuhn*, 407 U.S. 258 (1972).

APPENDIX C

The Washington Post, April 2, 1982, Page D1

NFL FAILS TO GET ANTITRUST BILL INTRODUCED

By Jane Leavy
Washington Post Staff Writer

The Senate recessed yesterday without introducing an antitrust exemption bill for professional sports, despite intense lobbying by the National Football League. A lawyer for the league had predicted that the bill would be introduced by the end of this week.

One of the immediate effects of the proposed legislation would be to extricate the NFL from the Oakland Raiders' lawsuit now being retried in Los Angeles.

A spokesman for Senate Majority Leader Howard Baker (R-Tenn.) said that although Baker favors an antitrust exemption, he would not support a bill that included a retroactivity clause. "He is not supportive of something that would impact on the Al Davis lawsuit," the spokesman said. "If that's what is in the draft, he would have some problems with it."

The spokesman said Baker had not seen any drafts of the proposed legislation and had no intention of introducing it when the Senate comes back in session April 13.

Sources said the NFL failed to get the bill introduced for several reasons: intense lobbying by the NFL Players Association and players unions in other sports; adverse publicity; and a crowded Senate calendar that included hearings on another controversial antitrust bill—which did not directly involve sports, but did involve the issue of retroactivity.

Ed Garvey, the executive director of the NFLPA, said, "I think it became such a hot potato that they had trouble finding a sponsor."

Appendix C

Sen. Alan Simpson (R-Wyo.) said he is "rather supportive of the legislation" and thinks there is "a special need to take a special look at the situation," but does not intend to sponsor the legislation.

A spokesman for Sen. Dennis DeConcini (D-Ariz.), who had been regarded as a potential sponsor, said he would not introduce legislation this week. A spokesman for Sen. Howell Helflin (D-Ala.) said he had no plans to introduce the legislation, although he might cosponsor it.

Garvey said senators opposing the legislation included Sen. Lowell Weicker (R-Conn.), Sen. Bill Bradley (D-N.J.) and Sen. Howard Metzenbaum (D-Ohio).

The NFLPA believed that proponents of the legislation would attempt to rush the bill through Congress, perhaps as a rider, without hearings.

Weicker, Bradley and Metzenbaum wrote letters to Baker and Sen. Robert Byrd (D-W. Va.), the minority leader, saying they would not give their consent to allow the bill to go directly to the floor, which meant that they would have to be notified if it were attached as a rider.

Paul Tagliabue, a lawyer for the league, said, "Any suggestion that we were trying to get legislation through the Senate without hearings is totally false . . . The expectation of the league always has been that there would be hearings with a full review of the merits."

The issue first became public last December, when NFL Commissioner Pete Rozelle testified before the subcommittee on monopolies and commercial law of the House Judiciary Committee that the league needed an antitrust exemption. NFL teams, he said, "are partners acting together in a common enterprise."

Appendix C

The league also argues that without an exemption, expansion is difficult, because under antitrust laws, the league can be sued by cities and persons not receiving franchises.

The league currently is involved in two antitrust lawsuits—the Davis suit and the one brought by the former owners of the World Football League franchise in Memphis, which has not yet gone to trial. He said these suits involve $150 million in potential liabilities.

In January, in an interview in the Memphis Commercial Appeal, Baker said he believed Memphis had "the best chance of any city in the country" to get an NFL franchise. He also said he supported legislation for an antitrust exemption, but that the two issues were separate.

The interview, Garvey said, was the union's first indication of the strength of support for the bill in the Senate.

On March 25, Rozelle admitted that the NFL was using the lure of expansion to win congressional support for the legislation. "If that's dangling," he said, "then it's dangling."

Joseph Alioto, Davis' attorney, responded by asking the Senate Ethics Committee to investigate. "If they don't act and put those people under oath, we'll file a civil suit alleging that they were trading a Memphis franchise for Baker's vote and we'll put them under oath," Alioto said.

In a letter dated March 25 to Sen. Malcolm Wallop (R-Wyo.), chairman of the Select Committee on Ethics, Baker reiterated that there was no connection between his support for both an NFL franchise in Memphis and antitrust leglislation.

Union representatives believe the antitrust legislation, as written in draft form, would give the league an antitrust exemption so broad that the NFL would, for example, have the right to negotiate pay television contracts as a single entity without getting a special exemption. The NFL had

to get a special exemption to negotiate with the television networks as a single entity in 1961.

They also say the bill has the potential to make it impossible for players to sue under antitrust laws over issues such as the draft, reserve rules and option clauses. Most of the players' gains on these issues have come through the courts as a result of suits brought under antitrust laws.

Tagliabue said the league was not asking for any expansion of the authority it was granted in 1961. "Under this bill, the players would have any and all antitrust rights they have now," he said.

Tom Jorde, a professor of antitrust law at the University of California at Berkeley, said, "Sports franchises are different from traditional manufacturing concerns in that they require a degree of cooperativeness to produce the high quality product, namely sports entertainment."

But he argues that this special status is "not sufficient justification for a complete exemption from the antitrust laws," and says these laws can be applied to the sports industry in a sensitive manner "by employing rule-of-reason standards that the courts have already developed."

Jorde says that there is an inequity regarding exemptions in professional sports, because baseball received a complete antitrust exemption from the Supreme Court in 1922—an exemption that other sports do not have. But he said the way to remedy that inequity is to have Congress repeal the exemption for baseball.

"The problem with an exemption is that it provides a monopoly to the league—and therefore monopoly profits to be divided between owners and players—and deprives consumers of any protection under the antitrust laws," he said.

APPENDIX D

New York Times, April 4, 1982, Section 5, Page 8

N.F.L. PRESSES FOR ANTITRUST EXEMPTION

WASHINGTON, April 3—The National Football League is on Capitol Hill, dealing with Congress in hopes of achieving what would be as important for the league as any Super Bowl. The N.F.L.'s aim: exemption of the league from Federal antitrust laws.

Within the next few weeks, N.F.L. owners say, a bill will be introduced in Congress designed to protect the league from almost all antitrust prosecution.

The legislation could dash the hopes of Al Davis, owner of the Oakland Raiders, who is suing the N.F.L., asserting that it has violated the 1890 Sherman Act, the nation's primary antitrust law. He has charged the N.F.L. with conspiring to stop him from moving the Raiders to Los Angeles. The league says there is no conspiracy, only 28 separate teams voting on the issue.

Players say that a bill exempting the N.F.L. from antitrust laws would lead to abuse of fans, stadium owners and the players themselves. "We're going to do everything we can to fight it," says Doug Allen, a spokesman for the National Football League Players Association.

Commissioner Pete Rozelle has called the antitrust exemption one of the league's top priorities. The league has mounted a lobbying effort, utilizing Washington lawyers, to get the bill through Congress this year.

Although drafts of the measure have been circulating for weeks, no Congressman has yet stepped forward to sponsor the bill. Its chances for passage if introduced are unclear. Congressional sources who asked not to be identified said they know of no firm support for the bill among the leadership of either the House or Senate.

Appendix D

Antitrust issues, the N.F.L. says, have overwhelmed the league and made the exemption necessary. The proposed bill might include similar antitrust protections for all professional team sports. So far, only baseball is exempt, based on a 1922 Supreme Court decision.

"We're just trying to clarify our status under the antitrust laws," says Thomas C. Williams, an N.F.L. attorney. "A professional sports league is different from other businesses. When we get together to decide something, we don't think we should be charged with conspiracy."

John C. Weistart, a law professor at Duke University, agreed with the league during testimony before a House antitrust subcommittee last fall. If professional sports leagues are to survive, Mr. Weistart said Friday, they must act in a manner the law might sometimes consider anticompetitive.

"The courts haven't shown that they understand the uniqueness of a sports league," said Mr. Weistart. He said he supported "narrowly drawn" antitrust exemptions for the N.F.L., as long as they did not affect labor issues.

Whether or not labor protections are written into the bill, Allen said the N.F.L. legislation would leave the league, unburdened by antitrust fears, free to conspire against players and even team owners.

"The potential for abuse is unlimited," he said. "Besides, why should a financially successful industry like the N.F.L. be granted privileges that don't exist for any other businesses?"

Allen said the league had done little to build public sympathy for itself when it announced a new network television contract last month that will bring in more than $2 billion over five years for the owners of the 28 N.F.L. teams, with each team getting an equal share of the revenue.

Appendix D

Destruction of Union Seen

One of the supporters of the players association is Gerald W. Scully, professor of economics at Southern Methodist University, who said that if the proposed antitrust exemptions were approved by Congress, "the N.F.L. would become a legal cartel." Mr. Scully also testified on the issue in Congress last year.

"It would effectively destroy the players union by giving the league almost complete authority to act collusively," he said.

Even though there appears to be no vocal support in Congress for the antitrust exemptions, N.F.L. representatives say they are hopeful of the bill's passage. "It'll happen," said Mr. Williams.

Players are not so sure, and they plan to have more than 50 players roaming the halls of Congress later this spring, looking to defeat any moves for an N.F.L. bill.

APPENDIX E

Statement of Parties in Interest Pursuant to Rule 28.1

The parties to the proceedings below (including the names of the respondents) as of the time of trial are set forth in the footnote at page ii of the petition. In compliance with Rule 28.1 of the Rules of the Supreme Court, set forth in the margin below are the names of the parent or affiliated corporations of the 6 of said respondents which are (or were) controlled by corporations.* The remaining respondents are (or were) either controlled by individuals or, in the case of the North American Soccer League ("NASL"), is an unincorporated association.

Since the time of trial, the following additional corporations have, through NASL team ownership transfers, acquired control of NASL clubs: La Brasserie Molson du Quebec Limitee (Montreal Manic); and York-Hannover Ltd. (Toronto Blizzard).

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* The corporations having control of NASL teams at the time of the trial were: Bayly Corporation (Houston Hurricane); Thomas J. Lipton, Inc. (New England Tea Men); Warner Communications, Inc. (New York Cosmos); Louisiana Pacific Corporation (Portland Timbers); Global Communications, Ltd. (Toronto Blizzard); and Gulf & Western Industries, Inc., through its subsidiary, Madison Square Garden Corporation (Washington Diplomats). Since trial, the Houston and Washington teams have ceased operations.